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No. (1)

IN THE

# Supreme Court of the United States

PERCY BONILLA, MIGUEL HERNANDEZ, CARLOS CRUZ, MICHAEL MACHADO, JULIO J. ALVAREZ, GERMAN SANDOVAL, CARLOS CASTRO, EDGARDO AVILA, JOSE A. CABRERA, PORFIRIO VARELA, ERMIN TALAVERA, PETITIONERS

*v.*

BAKER CONCRETE CONSTRUCTION, INC.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in its ruling in direct conflict with the United States Supreme Court ruling in *IBP, Inc., v. Alvarez* 546 U.S. 21 (2005), and the United States Supreme Court ruling in *Steiner v. Mitchell*, 350 U.S. 247 (1956), concluding that mandatory travel time is exempted from overtime wage compensation under the "Portal-to-Portal Act" 29 U.S.C. § 254.

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## PETITION FOR WRIT OF CERTIORARI

Percy Bonilla et al. ("Appellants") petitions for a writ of certiorari to review an opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated May 30, 2007, is officially reported as Bonilla v. Baker Concrete Construction Inc. 487 F.3d 1340, and is reproduced at App. 1a- 14a. The 11th Circuit Court of Appeals order denying Petition for Rehearing is reproduced at App, 48a-49a. The decision of the Southern District of Florida is reproduced at App.15a-47a.

## JURISDICTION

The petition is timely under 28 U.S.C. §2101(c), 28 U.S.C. §1254 and Supreme Court Rule 13.3 because it is being filed within 90 days of the 11th Circuit Court of Appeals denying Petition for Rehearing affirming the Southern District of Florida's decision granting Defendant's motion for summary judgment.

## RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. § 207 (a)(1) of the Fair Labor Standards Act; 29 U.S.C. § 254 Portal to Portal Act; 29 C.F.R. 785.38 Travel that is all in the day's work; 29 C.F.R. 790.6(b) Periods within the "workday" unaffected. 29 C.F.R. § 790.7 (h) "Preliminary" and "postliminary" activities.

Section 207 (a)(1) of the FLSA, maximum hours (29 U.S.C. § 207 (a)(1))

> a. Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 254 of the Portal to Portal Act (29 U.S.C. § 254)

> Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation
>
> (a) Activities not compensable. Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such

employee engaged in on or after the date of the enactment of this Act [enacted May 14, 1947]—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom. Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such

activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction of time employed with respect to activities. For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities. In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Section 785.38 Travel that is all in the day's work. (29 C.F.R. 785.38)

> Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C. A. 10, 1944)).

Section 790.6(b) Periods within the "workday" unaffected. 29 C.F.R. 790.6(b)

> (b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday",

and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked. n38 If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday, n39 and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

29 C.F.R. § 790.7 (h) "Preliminary" and "postliminary" activities.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions. This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs

his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.

## STATEMENT

The Appellants were all employed as construction workers to perform work at Miami International Airport (MIA) for the relevant time period. According to the Appellants[1] and one of

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[1] R- 74 C. Cruz-pg 27, line 20-23. R-72 J. Cabrera-pg 22, line 24-25; R-72 J. Cabrera-pg 23, line 1-2; R-72 J. Cabrera- pg 27, line 9-17; R-72 J. Cabrera-pg 28, line 12-15 and 21-25; R-72 J. Cabrera-pg 29, line 1-6 R-71 E. Avila-pg 32, line 1-9, 17-25; R-71 E. Avila-pg 33, line 1-13 R-70 G. Sandoval-pg 26, line 10-25; R-70 G. Sandoval-pg 33, line 1-13 R-69 E. Talavera-pg 17, line 5-18; R-69 E. Talavera-pg 20, line 20-24; R-69 E. Talavera-pg 21, line 13-25; R-69 E. Talavera-pg 22, line 1-25; R-69 E. Talavera-pg 23, line 1-11 R-69 E. Talavera-pg 24, line 3-18 R-68 P Varela, pg 14, line 11-25; R-68 P Varela, pg 21, line 18-25; R-68 P Varela, pg 22, line 1-25; R-68 P Varela, pg 23, line 1-25; R-68 P Varela, pg 24, line 1-25; R-68 P Varela, pg 25, line 1-25; R-68 P Varela, pg 26, line 6-14 and line 25-25; R-68 P Varela, pg 27, line 1-11; R-68 P Varela, pg 28, line 13-15 R-66 M. Hernandez, pg 15, line 22-25; R-66 M. Hernandez, pg 16, line 1-2; R-66 M. Hernandez, pg 21, line 20-25; R-66 M. Hernandez, pg 22, line 1-25; R-66 M. Hernandez, pg 23, line 5-25; R-66 M. Hernandez, pg 24, line 1-25 R- 65 M. Machado, pg 26, line 2-25; R- 65 M. Machado, pg 28, line 8-14 and 22-25; R- 65 M. Machado, pg 29, line 1-14; R- 65 M. Machado, pg 41, line 4-25; R- 65 M. Machado, pg 42, line 1-25; R- 65 M. Machado, pg 43, line 1-25; R- 65 M. Machado, pg 47, line 4-22; R- 65 M. Machado, pg 48, line 2-2.

Appellee's upper managerial personnel[2] in addition to the "Construction Related Requirements[3]", the Appellee ordered the Appellants to park in a designated lot located approximately 3.2 miles away from (MIA) and ordered the Appellants to take designated commercial buses from the lot to the security gate at (MIA) each workday. Appellants were required to be at the site approximately one hour prior to the formal workday beginning. These buses held approximately fifty passengers. Before arriving at their respective worksites, Appellants has to carry identification for entry at the security gates and carry their safety equipment, including safety goggles, a hard hat, boots and gloves. The Appellants would de-board the buses at the security gate and form a line in order to complete security screening. After completing security screening, the Appellants would re-board the bus and were taken to their air-side construction jobsite. This process would be repeated in the afternoon each day as well. The Appellants spent approximately 45 minutes to one hour each way on a daily basis getting to their air-side jobsites and returning to the designated parking lot each afternoon. Appellants were

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[2] [R.59-- Orr Depo. P.21, L.3-P.22, L.25].

[3] The CRR "Construction Related Requirements" for the MIA project at chapter 1 states that its contents are "requirements" for the construction work at MIA and that its contents are to be considered as construction related activities. See section 1.1.

At Chapter "3" of the "CRR", the Rule book states:

> 3.1 " Effective May 14th, 2001, the construction workers' parking facility will be located at the Miami Jai-Alai, 36th Ave and 36th Street. This site will be used immediately by all field employees....All parking garages within the Airport property are reserved for the use of airport patrons and County employees only."

not compensated in any form for their travel time between the designated parking lot and their job site.

The Magistrate Judge granted summary judgment in favor of Baker Concrete Construction Inc. finding that the travel time that Appellants spent traveling to work in buses from the parking lot, to and through the security, and then to the job site, and the return trip after work, was merely travel time, which is not compensable under the FLSA. The United States Court of Appeals for the 11th Circuit ruled that mandatory travel time is exempted from compensation under the "Portal-to-Portal Act" and otherwise found that the security screening process was not compensable since it was purportedly not indispensable to the Plaintiffs' principal work activity.

## REASONS FOR GRANTING THE PETITION

### I. MANDATORY TRAVEL TIME INCURRED BY AN EMPLOYEE AFTER MEETING AT AN EMPLOYER-DESIGNATED LOCATION IS COMPENSABLE UNDER THE FAIR LABOR STANDARDS ACT 29 U.S.C. 201-216 AND DOES NOT FALL UNDER THE PORTAL TO PORTAL EXEMPTION OF 29 U.S.C. §254.

Pursuant to 29 U.S.C. Sec.207(a)(1), workers are entitled to one and one half times their regular hourly rate for any hours worked per week in excess of forty hours. However, there are certain exemptions applied to the Fair Labor Standards Act such as the Portal to Portal Act 29 U.S.C. §254 et al. Exemptions under the Fair Labor Standards Act are to be construed strictly

and narrowly in favor of coverage of employees, affording maximum coverage to the employees due to the broad remedial purpose behind the Act. *Nicholson v. World Business Network, Inc.*, 105 F.3d 1361 (11th Cir. 1997) *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, (1960) Mitchell v. Kentucky Fin. Co., 359 U.S. 290, (1959).

The Portal-to-Portal Act, 29 U.S.C. § 259 et al. which amends the Fair Labor Standards Act ("FLSA"), identifies those employee activities which are not compensable under the FLSA. An employer is not subject to liability under the FLSA for failure to pay employees overtime compensation for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the **normal commuting area** for the employer's

> business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee. [Emphasis added].

29 U.S.C. § 254(a).

However, on the other hand, preliminary and postliminary activities, are compensable if they are "an integral and indispensable part of the employee's principal activities." *Steiner v. Mitchell*, 350 U.S. 247 (1956).

The question at hand is whether, employer required parking and travel from the designated parking lot to the security gate and from the security gate to the job site each workday, constitutes a preliminary and postliminary activity that is an integral and indispensable part of the employee's principal activities and therefore should not be included in the Portal-to-Portal exception of the FLSA.

The Portal-to-Portal Act, 29 U.S.C. § 254 (a), does not eliminate employer liability for all work related travel. As illustrated in 29 C.F.R. §785.35:

> An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

On the other hand, 29 C.F.R. § 785.38. illustrates this distinction between compensable and non-compensable travel:

> Time spent by an employee in travel as part of his **principal activity**, such as travel from job site to job site during the workday, must be counted as hours worked. **Where an employee is required to report at a meeting place** to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.[Emphasis added].

The former Fifth Circuit in *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976) established that the terms "principal activity or activities" are to be liberally construed to encompass "any work of consequence" and that the Portal-to-Portal act must be read in conjunction with the rest of the FLSA. *Id.* at 398. The excepting language of § 4 was intended to exclude from FLSA coverage only those activities "predominantly spent in the employees own interests." *Id.* at 398. The activities must be undertaken "for [the employees'] own convenience, not being required by the

employer and not being necessary for the performance of their duties for the employer."[4] *Id.* at 398. Therefore, when an employer derives "significant benefit" from the activity at issue, that activity is principal to the performance of the work for which the employees are employed , and is therefore compensable. *Id* at 399. In quoting *Steiner v. Mitchell*, 350 U.S. 247 (1956), "Nor was the exemption to apply to work "performed . . . before or after the regular work shift . . . [as] an integral and indispensable part of the principal activities for which covered workmen are employed".

In determining whether the preliminary or postliminary activities are so "integral and indispensable" the Eleventh Circuit in the proceedings below followed the factors enumerated in *Dunlop* at 401. The factors to be considered are (1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties and (3) whether the activity primarily benefits the employer.

In determining whether the activity was required by the employer, Appellants as well as one of Appellee's upper managerial personnel, stated in their deposition testimony that Appellants were ordered by Appellee to park in the designated lot approximately 3.2 miles from their work site. Additionally, Chapter "3" of the Construction Related Requirements, rule book states:

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[4] Mitchell v. Southeastern Carbon Paper Company, 228 F.2d 934 (5 Cir. 1955).

> "3.1 " Effective May 14th, 2001, the construction workers' parking facility will be located at the Miami Jai-Alai, 36th Ave and 36th Street. This site will be used immediately by all field employees....All parking garages within the Airport property are reserved for the use of airport patrons and County employees only."

Based on the deposition testimony in conjunction with the Construction Related Requirements rule book, it appears that the requirement to park at the designated parking lot was required by the employer.

The second element is whether the activity is necessary for the employee to perform his or her duties. The Eleventh Circuit seemed to merely focus on the security screening claim. However, when applying this test, it should be focused on the designated parking lot and bus travel aspect of the claim as well. Parking at the designated parking lot and riding the bus was a necessary activity for the Appellants. As stated in the deposition testimony cited above, Appellants were required by their employer to park their cars at this designated parking lot.

The third element is whether this activity benefits the employer. In our present case, when the Appellants arrived an hour prior to their shift each morning to board the bus that would take them to the security check point, it was not done for the Appellants own convenience or benefit, but was done for the employers benefit. It would have been more convenient and beneficial for the Appellants to be able to drive directly to work each day, and at the end of the day be able to head directly to their cars and go home. The

time spent on the bus going to and from the parking lot was an inconvenience for the Appellants and mandated by their employer. The primary benefit was for the employer. By designating a parking lot away from the airport, this allowed regular patrons to use the existing airport parking lots without worrying about overcrowding. It is Appellants belief that the underlying reason for the designated parking lot was the concern that the regular airport parking lot would become overcrowded by Appellants parking there, leaving little room for actual airport patrons and county employees. This in effect only benefited the employers and not the Appellants. The employer benefited, simply by being able to maintain their contract with the airport through this arrangement.

It can be argued that Appellants received some sort of benefit, primarily that they did not have to pay for airport parking, however that alone does not make the time spent traveling to and from the parking sites non-compensable since that arrangement significantly benefited the employers. ("The activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee.").[5] The underlying reason for the designated parking lot was so that the regular airport parking lot would not get overcrowded by Appellants parking there, leaving little room for actual patrons and county employees. This in effect primarily benefited the employers and not the Appellants. Simply put, Appellants would have traded their parking fee for paid hours work.

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[5] *Sec'y of Labor v. E. R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir. 1974)

Therefore, it is Appellants contention that when their employer required Appellants to park at the designated parking lot and take the designated bus, appellants were performing a preliminary and postliminary activity that is integral and indispensable part of the employee's principal activities. As stated in 29 C.F.R. § 785.38:

> "Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work."

Appellants employers required Appellants to show up at the designated parking lot and board the designated bus, at that point in time that was a preliminary activity that was an integral and indispensable part of the employee's principal activities. Therefore, any walking time/travel time that takes place after the preliminary activity that was an integral and indispensable part of the employee's principal activities is part of Appellants continuous workday as stated in the United States Supreme Court case of *IBP Inc. v. Alvarez*, 546 U.S. 21, 37 (2005):

> " For the foregoing reasons, we hold that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under § 4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA."

Therefore, although it was a preliminary activity, as shown above, once it became integral and indispensable to the principal activity, the preliminary activity became a principal activity and should therefore not fall under the Portal-to-Portal Act, and should remain under the coverage of the FLSA.

Additionally, the Supreme Court in IBP Inc, when analyzing the last case stated "As explained below, our analysis would be different if Barber required its employees to arrive at a particular time in order to begin work." The court went on to cite 29 CFR §790.7(h) states that when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activity." *Id* at 41. In our present case, based on the deposition testimony, the employer required Appellants to arrive approximately an hour prior to the actual workday beginning, and as mentioned above, the waiting at the designated parking lot to board the designated bus in it of itself became the principal activity. Therefore, based on this reasoning, Appellants fit the description of the aforementioned CFR provision, and should be viewed as an employee showing up at his place where he performs his principal activity., thus affording them FLSA coverage.

Although Appellants contend that this case should be viewed in one category, the United States Court of Appeals for the Eleventh Circuit, when

determining the case below, decided to break up the analysis of the case into two categories. The first category which they summarily dismissed was the designated parking lot and the bus ride from the parking lot until the security check point. The second category that they analyzed was Appellants travel from the security check point until Appellants reached their work area at the airport. When determining whether the trip from the security check point until Appellants reached their work site, the Eleventh Circuit in the proceedings below followed the factors enumerated in *Dunlop* at 401. The factors to be considered are (1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties and (3) whether the activity primarily benefits the employer. Their courts analysis was as follows:

> "In this case, the screening was required by the FAA, and appellee had no discretion as to whether its employees would be screened. See 49 C.F.R. § 1540.107:see also Civil Aviation Security Rules 67 Fed. Reg. 8340 at 8354 (Feb. 22, 2002). So although the screening was necessary for the employees to perform their work, appellee did not primarily—or even particularly—benefit from the security regime."

This reasoning is in direct conflict with the United States Supreme Court Ruling in *Steiner v. Mitchell*, 350 U.S. 247 (1956). In 1955, eight years after the enactment of the Portal-to-Portal Act, the United States Supreme Court was confronted with the question whether workers in a battery plant had a statutory right to compensation for the "time incident

to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide. After distinguishing "changing clothes and showering under normal conditions" and stressing the important health and safety risks associated with the production of batteries, the Court endorsed the Court of Appeals' conclusion that these activities were compensable under the FLSA.

However, in no place during the Steiner ruling, did the Supreme Court state since the employer was bound by state law, the employer has no discretion. Regardless of what the state or federal law may be, the analysis used to determine whether or not the preliminary and postliminary activity that is integral and indispensable part of the employee's principal activities should still be followed. As in Steiner the court was able to point to important health and safety issues that required preliminary and postliminary activity to be compensable under the FLSA, so too in our case we can point to several safety issues in regard to FAA regulations when entering an airport, and yet analyze whether or not this preliminary and postliminary activity is an integral and indispensable part of the employee's principal activities.

The factors to be considered are (1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties and (3) whether the activity primarily

benefits the employer. *Dunlop* at 401. Their entire analysis for the three prongs is as follows:

Going through security was definitely required by the employer, as no employee would be allowed to enter the airport prior to going through security. Therefore, if the employer wanted to have any employers employed for the job, he would have to require them to go through security.

The activity of going through security is necessary for the employee to perform his or her duties. If an employee elects not to go through the security, he or she will be unable to work. This is the only prong that the Eleventh Circuit analyzed and agreed that the screening was necessary.

The activity primarily benefited the employer, as this allows the employer to make money. If the employees do not go through the security check point, the employees would not be allowed to perform their duties within the airport and the likely result is that the employer would lose his contract with the airport. Therefore, going through security primarily benefits the employer in this case.

Therefore, although it was a preliminary activity, as shown above, once it became integral and indispensable to the principal activity, the preliminary activity became a principal activity and should therefore not fall under the Portal-to-Portal Act, and should remain under the coverage of the FLSA.

## CONCLUSION

The petition should be granted for the above mentioned reasons.

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No. 06-12515

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PERCY BONILLA, MIGUEL HERNANDEZ, CARLOS CRUZ, MICHAEL MACHADO, JULIO J. ALVAREZ, GERMAN SANDOVAL, CARLOS CASTRO, EDGARDO AVILA, JOSE A. CABRERA, PORFIRIO VARELA, ERMIN TALAVERA,

Plaintiffs-Appellants,

versus

BAKER CONCRETE CONSTRUCTION, INC.,

Defendant-Appellee.

May 30, 2007, Decided

May 30, 2007, Filed

JUDGES: Before BLACK, BARKETT AND KRAVITCH, Circuit Judges.

OPINION BY: KRAVITCH

OPINION

KRAVITCH, Circuit Judge:

This case concerns whether time workers spent traveling on employer-provided transportation to a secure construction site or time spent going through

security screening is compensable under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Appellants Percy Bonilla, *et al.* ("appellants"), plaintiffs in the underlying dispute, appeal the district court's summary judgment order in favor of appellee-defendant, Baker Concrete Construction, Inc. ("appellee"). After careful consideration of the briefs, oral argument, and evidence in the record, we AFFIRM the district court's order.

## I. BACKGROUND

Appellants were construction workers employed by appellee, a subcontractor for the lead contractor Turner-Austin, for the North Terminal project at Miami International Airport ("MIA project") from approximately November 2001 until March 2003. n1

In order to reach their work sites inside the airport, appellants were required to pass through a single security checkpoint to the tarmac and then ride authorized buses or vans to their particular work site. Because FAA regulations prohibit unauthorized vehicles in the secured tarmac area, Turner-Austin provided free buses or vans to transport appellants and other workers from the free employee parking lot to the security gate and on through to each of the separate work sites. Appellants were not required to park at the employee lot, but they were required to enter the facility through the single authorized security entrance and then ride the contractors' authorized vehicles to the various work sites. The security gate was near other public parking lots and a public bus stop; appellants were free to meet the authorized vehicle at the security gate rather than at the employee parking lot several

miles away. Riding Turner-Austin's authorized vehicles was the only way for the workers to access the construction sites after passing through the security gate.

The employees did not perform any labor while waiting for or riding the vehicles, either at the beginning or end of each work [*3] day. No instructions were given by the supervisors nor were any tools carried on the buses because the tools were kept at the work sites. Appellants signed in at the work site and then received their instructions for the day. At the end of the day, appellants would sign out before boarding the bus to leave the airport through the security gate.

Although appellants claim that appellee or Turner-Austin supervisors did work on the vehicles and at the security gate (head counts and general supervision), appellants do not claim that they had any responsibilities or duties before arriving at their respective sites other than to show their identification at the security gate and carry their personal safety equipment, including safety goggles, a hard hat, and work boots. Appellants point to the contractors' agreement with the airport, the Construction Related Requirements ("CRR"), that requires all employees to display their personal safety equipment as a condition of being transported to the job site. Appellee disputes appellants' claim that there was any evidence that employees were required to carry their personal safety equipment on the bus.

Appellants were not paid by appellee for the [*4] time spent riding the buses or vans. There were no allegations that appellee, Turner-Austin, or any

representative of appellee ever discussed with appellants whether they would be paid for the time waiting for or riding the authorized buses, nor were there any requests by appellants to be paid for this time.

## II. DISCUSSION

We review the district court's grant of summary judgment de novo. *Gibson v. RTC*, 51 F.3d 1016, 1020 (11th Cir. 1995). This appeal presents a question of statutory interpretation. Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), exempts certain activities from compensation under the FLSA, 29 U.S.C. §§ 201 et seq. The question before us is whether appellants' time spent riding the buses or going through airport security constitutes such an exception. The Act exempts the following activities from compensation:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, [*5] which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities....29 U.S.C. § 254(a). n2

Under the plain meaning of section 254(a), this case pivots on whether appellants are engaging in any work-

related activity before arriving at their work sites inside the airport tarmac. If appellants were merely traveling to their "actual place of performance of the principal activit[ies]" before beginning any work activity, [*6] then section 254(a)(1) exempts such traveling from compensation under the FLSA. But, if appellants, by boarding those buses, going through security, or carrying their personal safety equipment, are engaging in work-related activity that is "integral and indispensable" to their work, then any travel afterwards is compensable. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37, 126 S. Ct. 514, 525, 163 L. Ed. 2d 288 (2005) ("[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under [29 U.S.C. § 254(a)] of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity is excluded from the scope of the provision, and as a result is covered by the FLSA.").

*a) Travel Claim*

The district court found that it is "undisputed that the actual place of performance of the principal activity or activities which [appellee] employed [appellants] to perform was the Project jobsite at MIA's North Terminal," and that it "is also undisputed that [appellants] did not perform any work either when waiting for [*7] the buses or while they were riding the buses." We find nothing in the record to contradict this conclusion. As stated above, the parties disagree as to whether appellants were required to carry their personal safety gear on the buses. But we do not find this dispute to be material to the issue at hand because our analysis of the Portal-to-Portal Act would be the

same regardless. See *Danskine v. Miami Dade Fire Dep't*, 253 F.3d 1288, 1292-93 (11th Cir. 2001) ("A factual dispute is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the non-moving party.") (internal quotations and citation omitted).

The Department of Labor has issued interpretive statements giving examples of non-compensable travel under § 254(a). These statements are not promulgated regulations because Congress did not authorize the Secretary of Labor to issue regulations regarding the scope of the exemptions. 29 C.F.R. § 790.1(c); see *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 914-15, 163 L. Ed. 2d 748 (2006) ("Deference in accordance with Chevron, however, is warranted only when it appears that Congress delegated authority [*8] to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") (citation and quotation omitted).

Here, however, the illustrative examples are persuasive and should be given due deference. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944) ("[R]ulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give

it power to persuade, if lacking power to control."). In this case, the DOL's interpretation of § 254(a) speaks directly to the issue at hand:

Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" [*9] activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.29 C.F.R. § 790.7(f).

The plain language of section 254(a)(1) excludes "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities." The appellants' claim regarding the time spent on the employer vehicles both before and after the security check point fits squarely within this statutory exception, and the administrative interpretation of the statute also specifically addresses the question of transportation to and from the work site. The fact that the workers were required to ride authorized transportation after the security gate but the transportation to the security gate was optional is not relevant to the outcome of this case because even mandatory travel time is exempted from [*10] compensation under the Portal-to-Portal Act. We therefore hold that the time appellants spent traveling on the vehicles both before and after the security check point is exempt from compensation under the FLSA. n3

*b) Security Screening Claim*

Unlike the time spent riding the employer vehicles, the time appellants spent going through airport security is not exempted under § 254(a)(1), so we must determine if this security screening is exempted under another provision. n4 Section 254(a)(2) exempts "activities which are preliminary to or postliminary to said principal activity or activities." The Supreme Court has interpreted this section to apply when an activity before or after the principal work activity is not an "integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section [254(a)(1)]." *Steiner v. Mitchell,* 3350 U.S. 247, 256, 76 S. Ct. 330, 335, 100 L. Ed. 267 (1956).

The former Fifth Circuit analyzed several factors to determine whether preliminary or postliminary activities are so "integral and indispensable" as to be compensable. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398-400 (5th Cir. 1976). n5 The factors to be considered are: (1) whether the activity is required by the employer, (2) whether the activity is necessary for the employee to perform his or her duties, and (3) whether the activity primarily benefits the employer. *Id.* at 401. In this case, the screening was required by the FAA, and appellee had no discretion as to whether its employees would be screened. See 49 C.F.R. § 1540.107; see also Civil Aviation Security Rules, 67 Fed. Reg. 8340 at 8354 (Feb. 22, 2002). So although the screening was necessary for the employees to perform their work, appellee did not primarily--or even particularly--benefit from the security regime.

Appellants place great weight on the necessity of going through the screening in order to do their jobs. But the "integral and indispensable" test is not a but-for test of casual necessity. "[T]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under Steiner." *IBP*, 546 U.S. at 40-41, 126 S. Ct. at 518. If mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs. If the Portal-to-Portal Act is to have any meaning at all, its terms cannot be swallowed by an all-inclusive definition of "integral and indispensable." n6

In IBP, the Supreme Court addressed whether the time spent waiting to don protective clothing on the employer's premises before engaging in productive labor was compensable under the Portal-to-Portal Act. *IBP*, 546 U.S. at 24, 126 S. Ct. at 518. The Court held, in part, that the time workers spent waiting to don protective gear necessary for productive labor was not itself "integral and indispensable" to a "principal activity." *IBP*, 546 U.S. at 42, 126 S. Ct. at 528.

This circuit has not interpreted the Portal-to-Portal Act in a published opinion since the Supreme Court decided IBP. n7 The statutory language of the exemptions does not allow for a clean analytical distinction between those activities that are "integral and indispensable" and those that are not. But it is clear to us from the Act's language and history that the activity in question must be work in the benefit of the employer, and that

the security screening mandated by the FAA in this case is not compensable work. We therefore hold that the time appellants spent going through the mandatory security screening is not compensable under the FLSA because that screening is not "integral [*15] and indispensable" to a principal activity under *IBP*, Steiner, or Dunlop.

IV. CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in this case.

CONCUR

BLACK, Circuit Judge, concurring:

I concur in the result. I agree that the Appellants are not entitled to compensation for the nonmandatory time spent traveling from the parking lot to the security checkpoint. They are also not entitled to compensation for the mandatory time spent from the security checkpoint to their official job sites.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

1The district court granted summary judgment to appellee regarding Plaintiff Jose Cabrera on the ground that Cabrera was never employed by appellee nor had any joint employer relationship. This ruling is not appealed.

2The terms of § 254(a) are limited by § 254(b), which allows compensation provided by contract or custom. But the only evidence that appellants point to

regarding custom is the CRR, which requires workers to have identification and prohibits unauthorized vehicles within the airport. The CRR does not amount to a contract or custom that would limit the effect of § 254(a). Appellants do not assert that § 254(b) applies either.

3Circuits which have addressed the issue concur. See *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (holding that gas-drillers in New Mexico were exempt from FLSA compensation for travel that ranged from thirty minutes to three-and-a-half hours each way); *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (holding that dog handlers' commutes are not compensable just because they bring their dogs into work, and also noting that the Portal-to-Portal Act exemptions "properly protect employers from responsibility for commuting time and for relatively trivial, non-onerous aspects of preliminary preparation, maintenance and clean up"); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (holding that the four hours workers spent traveling on their employer's bus each day was not compensable under the Act); and *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966) (holding that time workers spent traveling on an employer's boat to a construction site was not compensable under the Act).

4The district court specifically ruled that time spent in security screening was not compensable under the FLSA, and the appellants appealed the court's order regarding the contested traveling time, which logically includes the entire time spent in security screening. 5The Eleventh Circuit has adopted as precedent the

decisions of the former Fifth Circuit rendered prior to October 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). 6The legislative history of the Portal-to-Portal Act underscores the scope of the exemptions from compensation. In 1946, the Supreme Court decided Anderson v. Mt. Clemens Pottery Co., holding that employees were entitled to compensation for the time they spent walking from the time clock to the workstation. 328 U.S. 680, 690-91, 66 S. Ct. 1187, 1194, 90 L. Ed. 1515 (1946). The year after Anderson was decided, Congress passed the Portal-to-Portal Act specifically exempting travel time-even within the employer's premise-from FLSA compensation requirements when the workers had not yet engaged in productive activity. See *IBP*, 546 U.S. at 26, 126 S. Ct. at 519.

7Appellants rely on an unpublished decision of this court interpreting the Portal-to-Portal Act. *Burton v. Hillsborough County*, 181 Fed. Appx. 829 (11th Cir. 2006) (unpublished). Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants. See *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1138 n.4 (11th Cir. 2004). Burton is not persuasive because its facts are materially different from this case.

In Burton, the county employees' duties required them to drive the county vehicles to and from various public works locations and to always return the county vehicle to a secured county facility overnight. This court found that the time the employees spent driving from the secured county location to the various work sites was compensable under the FLSA because picking up and

delivering the county vehicles to the county lots was integral and indispensable to the employees' principal activities. *Burton*, 181 Fed. Appx. at 837. In addition, Burton found that the vehicles served as satellite offices for those employees to do their jobs at the various sites and tools necessary for the work were locked in the county vehicles. Id. In Burton, driving the vehicles was not merely part of the employees' commute to the principal place of performance but rather an aspect of that job performance.

Furthermore, Burton concerned the interpretation of an amendment to the Act not relevant to this case. Burton examined the Employee Commuting Flexibility Act of 1996, which amended the Portal-to-Portal Act by adding the following language:

For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee. 29 U.S.C. § 254(a).

Although the Burton court applied the same "integral and indispensable" analysis that is at issue here, Burton's conclusion that the time spent by the employees driving their county vehicles is compensable does not support the same conclusion in this case. Not only are the relevant facts in Burton easily

distinguishable, we emphasize that as an unpublished case, Burton's analysis does not bind us.

Filed: 3/30/06
Case No. 02-23286-CIV- LENARD/SIMONTON
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CONSENT CASE

PERCY BONILLA, et al.,
Plaintiffs,

v.

BAKER CONCRETE CONSTRUCTION, INC,
Defendant.

# ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Presently pending before the Court are Defendant's Motion To Dismiss (DE # 55), Defendant's Motion For Summary Judgment (DE # 56) and Plaintiffs' Motion for Partial Summary Judgment As To Liability (DE # 86). Pursuant to the consent of the parties, this case is referred to the undersigned Magistrate Judge for final disposition (DE # 47). The motions are fully briefed (DE ##87, 91, 92, 97, 98, 99,141,103,104). For the reasons stated below, Defendant's Motion for Summary Judgment is granted, Defendant's Motion To Dismiss is deemed moot, and Plaintiffs Motion for Partial Summary Judgment is denied.

## I. Introduction

Plaintiffs Percy Bonilla, Miguel Hernandez, German

Sandoval, Carlos Castro, Edgardo Avila, Jose A. Cabrera, Porfirio Varela and Ermin Talavera (hereafter Plaintiffs) are proceeding under their V Amended Complaint against Defendant Baker Concrete Construction, Inc. (hereafter referred to as "Defendant") (DE # 19).[1] In their Complaint, Plaintiffs bring this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. Plaintiffs allege that, during the time period from approximately November 2001 through March 2003, while they while they were employees of Defendant working for varying periods of time as construction workers on the Miami International Airport North Terminal Program, they worked completely non-compensated hours and overtime hours, as well as partially compensated overtime hours (DE # 19).

As relief, Plaintiffs seek damages, double damages and reasonable attorney fees for all overtime wages, straight time wages and minimum wages still owing from each Plaintiff's entire employment period with Defendant, or as much as is allowed by the FLSA, whichever is greater. Plaintiffs also seek court costs and interest and any other relief which this Court finds reasonable under the circumstances (DE # 19).

Defendant has filed an Answer and Defenses to the Third Amended Complaint (DE # 20). These motions followed.

II. The Summary Judgment Motions[2]

A. Defendant's Motion For Summary Judgment

Defendant contends that it is entitled to summary

judgment because the time that Plaintiffs spent waiting for and riding on buses to and from the job site was merely an extended home to work and back commute, which was not compensable under the FLSA. Defendant relies on the Portal-to-Portal Act, 29 U.S.C. 254(a), and cases interpreting the statute. Defendant argues that the bus rides occurred prior to work commencement and subsequent to work cessation, and were clearly activities which were preliminary to and postliminary to Plaintiffs' principal work activities, and not activities which were indispensable to Plaintiffs' principal work activities. Defendant notes that Plaintiffs admit that 1) they did not perform any labor while they were waiting for or riding on the buses; 2) they kept their tools at the job site and carried only their lunches on the buses; and 3) they did not receive instructions for each days' work until after they signed in. Defendant also relies on the fact that there was no express contract term to compensate Plaintiffs for travel time (DE ## 56, 92). Defendant notes that the only evidence which supports Plaintiffs' position that the time they spent on the buses to and from work were indispensable to their jobs was the deposition answer of a former employee of Defendant to a series of leading questions from Plaintiffs' counsel (DE # 92 at 8-9). Defendant also objects to Plaintiffs' reliance on the depositions, taken in another case, of persons who were not employed by Defendant (DE # 92 at 2-4).[3]

Furthermore, Defendant contends that Plaintiffs' overtime rate claim is moot because the claimed injuries have been remedied either before or after the filing of the lawsuit and there is no reasonable likelihood of recurrence because none of Plaintiffs are still employed by Defendant. Defendant states that it

has tendered to Plaintiffs all sums due to them because of Defendant's miscalculation of the formula used to calculate Plaintiffs' overtime payments, and it also has served offers of Judgment in excess of the maximum amount recoverable under those claims (DE # 56). Defendant further contends that 1) Plaintiffs' overtime rate claim is moot regardless of the resolution of the travel time claim; 2) Defendant provided an affidavit setting forth the amounts of the payments made in resolution of the overtime rate claim and the method by which the amount was calculated; and 3) the affidavit clearly states that the offered payments were for hours worked and that travel time was not included (DE # 92 at 15-16).

B. Plaintiffs' Motion For Partial Summary Judgment

Plaintiffs move for summary judgment on liability on the travel time issue. They ask this Court to determine that their transport time is compensable under the Fair Labor Standards Acton the grounds that the transport time is indispensable to each of Plaintiffs' work for Defendant. Plaintiffs contend that it was for Defendant's benefit that Plaintiffs used the buses to get to the job site, and that travel on the buses was the only way in which Plaintiffs could get to and from their work at the Airport job site (DE # 86). Plaintiffs also rely on 29 C.F.R. 790.6(b). (DE # 91 at 3).

Plaintiffs, relying on Fed.R.Civ.P. 56(c), also contend that depositions from another case can be filed in support of Plaintiffs' motion for partial summary judgment, because the four persons whose depositions were submitted were disclosed by Plaintiffs as trial witnesses. Plaintiffs argue that Defendant made no

effort to depose the individuals (DE # 91).

As to the overtime rate issue, Plaintiffs contend that should this Court determine that the claimed transport time is compensable under the FLSA, the amount of overtime owed to Plaintiffs would have to be adjusted. Plaintiffs further assert that the value of the restitution to them from Defendant is too speculative absent this Court's determination of whether travel time is compensable. Plaintiffs next contend that Defendant has set forth no specific proof as to the amounts it purportedly paid each Plaintiff for the deficient overtime payments and has not set forth how it calculated those amounts. Finally, Plaintiffs assert that Defendant did mention whether the payments offered were for hours worked or included the requested travel time (DE # 86).

III. Undisputed Material Facts

The material facts in this case are essentially undisputed. The following facts are taken from both Plaintiffs' Statement of Material Facts (DE # 87) and Defendant's Statement of Undisputed Material Facts (DE # 56 at 3-12).[4]

A. The Airport Project

From at least November 2001 through March 2003, Defendant was involved in a construction project at Miami International Airport (hereafter MIA), the CD Terminal Infill Project (hereafter "the Project"). Plaintiffs worked on that project.

The Project involved the construction of a new aircraft

terminal building at MIA's North Terminal. Turner-Austin, the construction manager of the airport project, employed Defendant Baker directly as a subcontractor on the Project. At various times, the number of Defendant's employees on the Project ranged between 35 and 100.

Defendant employed Plaintiffs Bonilla, Cruz, Castro, Avila, Hernandez and Machado as laborers. Defendant employed Plaintiffs Talavera, Varela and Dinarte as carpenters. Plaintiff Sandoval worked in a "safety" position building hand-railings and similar features.

B. Plaintiff Cabrera Has Never Worked For Defendant

Plaintiff Cabrera performed iron work on the Project but actually worked for Dalecom Construction, not Defendant. Defendant has never employed Cabrera. Defendant does not have a joint employer relationship with either Dalecom or with Dalecom's successor company, Cuesta Construction, and Plaintiffs have never alleged that Defendant has a joint employer relationship with either Dalecom or Cuesta.[5]

While Cabrera testified at his deposition that he believed he worked for Defendant and not Dalecom because he worked in the same group as Defendant's employees, Cabrera admitted that he did not sign any papers for Defendant at the time he was hired. Cabrera received his paychecks from Dalecom and he received his end of year tax filing documents from Dalecom's successor company, Cuesta Construction.

C. The Travel Issue

1. Background

When the Project began in 1999, Defendant received, for the use of its employees, a large parking area near the airport, located off Milam Dairy Road, which was approximately one-half mile from an airport security gate.

From 1999 through 2000, Defendant used two 15-passenger vans to transport its employees through the security gate to the job site each morning. At the end of the work day, the employees rode the vans back from the job site to the parking area.

Defendant was required to transport its employees through the security check point to the job site because FAA regulations prohibited the general public from driving on the airport tarmac. Each of Defendant's employees was required to have a picture identification badge to get through the security gate to the job site. When the buses arrived at the security gate from the parking lot, Defendant's employees would exit the bus to run their security badges through scanning machines, and then re-enter the bus to travel to the job site. When Defendant's employees left the job site at the end of the work day, the same process was repeated in reverse.

Sometime in 2000, the airport stopped allowing Defendant to use the original parking area, and provided a new parking area, also located off Milam Dairy Road. At that time, Defendant Baker stopped using the 15 passenger vans to transport its employees to the job site and back because the vans were no longer adequate to transport the employees because

Defendant had hired more employees as the Project progressed. The employees then began to ride buses provided by Turner-Austin because, due to the large number of people working on the airport construction projects, the consolidation of employees into larger vehicles helped to prevent traffic jams on the tarmac. The buses were free to Defendant's employees. However, even after the Turner-Austin buses were made available to Defendant's employees, the employees sometimes used the 15 passenger vans when, at odd times, a small number of Defendant's employees were either entering or leaving the job site.[6]

As Defendant hired new employees for the Project, Defendant's office manager told the employees that free off-site parking was available at the Milam Dairy lot, and bus transportation to the job site was available from the lot. Employees of other construction companies also parked at the lot and rode the Turner-Austin buses to work. The buses left between 5:30 a.m and 6:30 a.m. each day. Defendant's employees also had the option of paying to park in a public parking lot. By using the free parking lot and the bus transportation, Defendant's employees did not have to pay for expensive public parking at the airport.

To get from the security gate either to the job site or elsewhere on the tarmac, Defendant's employees had to ride in one of Defendant's vans, one of Turner-Austin's buses, or in another authorized vehicle. The employees' private vehicles were not authorized vehicles.

Contractors' employees were not permitted to walk from the security gate to the job site, but were required to ride in authorized vehicles. However, Defendant's

employees also had the option to board the Turner-Austin buses at the security gate. Every day, some of the construction workers working at the airport would board the Turner-Austin buses at the security gate when going to work, and some of the workers also exited the Turner-Austin buses at the security gate when leaving work. In the immediate vicinity of the security gate there was a public bus stop and a taxi cab stand. Employees had been known to use alternative transportation to the security gate. Nothing prevented Defendant's employees from walking from the parking lot to the security gate, beside the fact that it was a long walk, approximately 3.2 miles.

Defendant's employees did not perform any labor or work either while they were waiting for the buses or while they were riding on the buses, either before or after work.

Defendant's employees did not receive any instructions from their foremen or their supervisors while they were waiting for or riding on the buses. Defendant's employees kept their tools in the tool box at the job site rather than carrying them back and forth each day. Defendant's employees carried nothing with them on the buses except their lunches.

When Defendant's employees arrived at the job site they signed in. They then received their instructions for the day's work, at 7:00 a.m. The last thing Defendant's employees did after completing their daily work was sign out. When Defendant's employees filled out their time sheets, they did not include time they spent waiting for or riding on the bus. Defendant's employees were paid from the time they arrived at the job site and

filled out their sign-in sheets. Defendant did not pay its employees wages for the time the employees spent traveling to and from the job site either in Defendant's vans or in the Turner-Austin buses.

Defendant had no employment agreement with any Plaintiff. Plaintiffs did not have any agreement with Defendant that they would be paid for the time they spent waiting for or riding on the buses. No representative of Defendant ever discussed with any Plaintiff whether he would or should be paid for the time that they spent waiting for or riding on the buses. Plaintiffs never requested to be paid for the time they spent waiting for or riding on the buses.

D. The Overtime Rate Issue

Defendant's employees were paid hourly. Each employee's pay rate was based on Department of Labor prevailing wage rates depending on the employee's craft. The prevailing wage rates were based on a union scale as specified by the Department of Labor. Defendant also followed Dade County Ordinance 2-1 1.16 governing hourly rates for employees working on projects at Miami International Airport. The employee wage rates were published in Defendant's contract with Turner-Austin.

Defendant did not provide its hourly employees with benefits, but in lieu of benefits, Defendant paid its employees a health and welfare cash equivalency. For example, an employee who made $20.00 per hour might receive a health and welfare benefit of $2.50 per hour, so that his paycheck would reflect gross pay of $22.50 for each regular hour worked.

For the purpose of calculating overtime payments, Defendant followed the requirements of the Davis-Bacon Act, under which an employer is not required to include the health and welfare cash equivalent benefit when calculating overtime payments. Because the Dade County wage ordinance applicable to the contract contained numerous references to the Davis-Bacon Act, Defendant believed that those provisions of the Davis-Bacon Act concerning overtime payments governed its obligations to pay overtime to Plaintiffs, and Defendant paid its employees based on that belief.

For example, if an employee's based rate was $20.00 per hour and his health and welfare cash equivalent benefit was $2.50 per hour, Defendant paid the employee a time and-a-half overtime rate of $30.00 per hour, plus $2.50 per hour for the health and welfare benefit, for a total of $32.50 for each overtime hour worked.

During the period relevant to this litigation, Defendant underwent a U.S. Department of Labor audit and discovered a miscalculation in the formula which it used to pay overtime to its employees. The Department of Labor informed Defendant that the Davis-Bacon Act did not apply to the project, and that the health and welfare equivalency benefits should have been included in Defendant's calculation of overtime payments. Thus, the employee in the above example should have been paid $33.75 per overtime hour worked, rather than $32.50. The amount of the shortfall for each employee was one-half of the employee's health and welfare cash equivalency benefit for each overtime hour worked.

When it discovered the miscalculation, Defendant

agreed to reimburse all of its employees for any shortfall in overtime payments caused by the miscalculation. Defendant worked with the Department of Labor and the Department furnished Baker with form releases to use in conjunction with the payments. Defendant sent a notice, written in both English and Spanish, to each of the affected employees, requesting them to come to Defendant's office to receive their check and then sign a release. Many of the employees did so. For most of the employees who did not pick up their checks, Defendant sent their checks to the Department of Labor for distribution, as requested by the Department. After the filing of the instant lawsuit, Defendant sent Plaintiffs' checks to Plaintiffs' counsel.

On December 24, 2003, Defendant served on Plaintiffs' counsel Offers of Judgment offering principal sums in excess of twice each Plaintiffs' overtime shortfall, together with interest and any attorney's fees and costs in order to compensate them for any conceivable loss that they may have incurred. While the Department of Labor did not require Defendant to pay double damages to its employees, in the Offers of Judgment, Defendant offered to pay Plaintiffs double damages, representing twice the amount of the shortfall in overtime payments resulting from the miscalculation.

IV. The Relevant Legal Standards

A. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Denney v. City of Albany, 247 F.3d 1172,1181 (11th Cir. 2001). Summary judgment is an integral part of the federal rules as a whole, which are designed to secure a just, speedy, and inexpensive determination of every action. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Allen v. Tyson Foods, Inc., 121 F. 3d 642, 646 (11th Cir.1997). In assessing whether the movant has met its burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-movant. See Denney v. City of Albany, 247 F.3d at 1181.

The moving party has the burden to establish the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Allen v. Tyson Foods, Inc., 121 F.3d at 646. Once the moving party has established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law, the burden shifts to the non-movant to come forward with a response setting forth "specific facts" showing that there is a genuine issue for trial. Thus, the party opposing summary judgment may not rest upon the mere allegations or denials of the pleadings, but must present sufficient evidence favoring the non-moving party for a jury to return a verdict in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249.

Conclusory allegations will not suffice to create a genuine issue of material facts. See Leigh v. Warner Bros Inc., 212 F.3d 1210, 1217 (11th Cir. 2000). There must be more than a scintilla of evidence; there must be "substantial conflict in evidence to support a jury question." Tidewell v. Carter Prods., 135 F.3d 1422,1425 (11th Cir.1998), quoting Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir.1989). Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Allen v. Tyson Foods, 121 F.3d at 646; accord Denney v. City of Albany, 247 F.3d at 1181. "At the summary judgment stage, [the plaintiff] bears the burden of coming forward with sufficient evidence to create genuine issues of material fact regarding each of th[e] elements [of the prima facie case]." Harris v. H&W Contracting Co., 102 F.3d 516, 523 (11th Cir.1996 ).

V. Analysis

A. Defendant Is Entitled To Summary Judgment as to Plaintiff Cabrera

Defendant is entitled to summary judgment as to the claims brought by Plaintiff Jose Cabrera. The record contains substantial evidence that Cabrera was never employed by Defendant. Cabrera has not provided any evidence that he was employed by Defendant.

Defendant contends that it is entitled to summary judgment concerning the claims brought by Plaintiff Jose Cabrera because there is no material issue of fact that Cabrera did not work for Defendant. Plaintiff Cabrera does not controvert Defendant's position.

The record evidence establishes that Plaintiff Cabrera performed iron work on the Project, but that he worked for Dalecom Construction, Inc., not Defendant. Cabrera testified at this deposition that he was paid by Dalecom Construction, and that he received his W-2 form from Cuesta Construction (DE # 72 at 10-12). This is consistent with the pay stubs and the W-2 for the relevant period which Cabrera provided to Defendant in discovery. Defendant asserts that it has never employed Cabrera (Affidavit of Jeffery Arnold, Ex. B to DE # 56, at 7,113). Cabrera testified at his deposition that he did not remember signing any papers with Defendant (DE # 72 at 14).

Furthermore, Plaintiffs have never alleged that Defendant has a joint employer relationship with either Dalecom Construction or with Dalecom's successor company, Cuesta Construction. Defendant states that it does not have a joint employer relationship with either Dalecom Construction or Cuesta Construction.

The only evidence that Cabrera worked for Defendant is Cabrera's deposition testimony that he believed he was working for Defendant because some people he was working with were working for Defendant. Cabrera's unsupported belief that he worked for Defendant is insufficient to defeat Defendant's summary judgment motion. Cf. Coutu v. Martin County Bd. of County Commn'rs, 47 F.3d 1068,1074 (11th Cir.1995) (a plaintiffs mere belief, speculation, or conclusion that he was subject to discrimination does not create an inference of discrimination or satisfy his burden).

Therefore, summary judgment is entered for Defendant

as to all claims brought by Plaintiff Jose Cabrera.

B. Defendant Is Entitled To Summary Judgment on the Travel Time Issue

Defendant is entitled to summary judgment on the travel time issue. The time which Plaintiff spent traveling to work in buses from the parking lot, to and through the security gate, and then to the job site, and the return trip after work, was merely travel time, which is not compensable under the FLSA.

Plaintiffs argues that the time spent traveling before work from the Milam Dairy Road parking lot to the MIA security gate, and from the security gate to their job site on the MIA North Terminal, as well as the return trip at the end of the day after work, is compensable time under the FLSA. Plaintiffs contend that because they had no means of reaching the job site other than the ride the buses provided by Turner-Austin or Defendant's vans, the ride became a indispensable activity conducted for Defendant's benefit, taking the ride outside the Portal Act's exemption.[7] Defendant responds that the travel time is not compensable pursuant to the Portal-to-Portal Act (hereafter "the Portal Act"), 29 U.S.C. §254(a).

The Portal Act, 29 U.S.C. §254(a), states, in pertinent part, as follows:

(a) ... no employer shall be subject to any liability or punishment under the Fair Labor Standards Act.. on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the

following activities of such employee engaged in on or after May 14, 1947 -

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. . .
(b)... Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such an activity is compensable by either

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collectivebargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity between such employee, his agent, or collective bargaining representative and his employer.

In determining whether an employee is entitled to compensation under the FLSA, this Court must construe broadly the scope of activities covered by the FLSA, and must construe narrowly those activities

exempted by the Portal Act. See Dunlop v. City Electric, Inc., 527 F .2d 394, 399 (5th Cir.1976).[8]

It is undisputed that the actual place of performance of the principal activity or activities which Defendant employed Plaintiffs to perform was the Project job site at MIA's North Terminal. It is also undisputed that Plaintiffs did not perform any work either when waiting for the buses or while they were riding on the buses. Plaintiffs did not receive any instructions from their foremen or supervisors while they were waiting for or riding on the buses. Plaintiffs kept their tools in the tool box at the job site and did not carry them back and forth on the buses. Plaintiffs did not include on their time sheets the time they spent waiting for or riding on the bus, and Defendant did not pay Plaintiffs wages for the time they spent traveling to and from the job site. Thus, when viewed as commuting time, Plaintiffs' travel to and from the job site is excluded under the plain language of Section 254(a)(1), unless Plaintiff can show, under Section 254(b), that the transportation time is compensable by either an express provision of a written or nonwritten contractor by a custom or practice in effect which is not inconsistent with a written or nonwritten contract. See e.g. Kavanagh v. Grand Union Co., 192 F.3d 269, 272-73 (2d Cir.1999).

While it appears that the use of authorized vehicles to get to and from the security gate to the job site was mandatory, there is no record evidence of any contract or representation by Defendant that Plaintiffs would be compensated for their travel time to and from the parking lot to the job site. Plaintiffs did not have any agreement with Defendant that they would be paid for

the time they spent waiting for or traveling on the buses. In fact, the evidence is undisputed that the work did not begin until Plaintiffs signed in at the job site. Therefore construing the Portal Act's exemptions narrowly, the undersigned concluded that the Act's plain language excludes from compensation Plaintiffs' travel time from the parking lot to the security gate, from the security gate to the job site, and the return trip at the end of the day. This interpretation of the Portal Act is supported by the recent Supreme Court case of lBP, Inc. v. Alvarez,126 S.Ct. 514 (2005).

In Alvarez, the Supreme Court found that the Portal Act excludes from the FLSA time spent waiting to don protective clothing. Id. at 527. Specifically, the Court stated:

[T]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are `integral and indispensable' to a `principal activity' under Steiner. For example, walking from a time clock near a factory gate to a workstation is certainly necessary for employees to begin their work, but it is undisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate Anderson's holding that such walking time was compensable under the FLSA. We discern no limiting principle that would allow us the conclude that the waiting time in dispute here is a `principal activity' under §4(a) and would thus be unaffected by the Portal-to-Portal Act.

Id. at 527 (emphasis supplied). The Court also noted that walking which occurred before the workday began was excluded from the FLSA by the Portal Act. Id. at

524.[9] It is undisputed that Plaintiffs do not work on the buses, that they do not carry their tools or receive instructions on the buses, and that they sign in and out at the job site. Since, as stated by the Supreme Court in Alvarez, time spent walking to the job site after clocking in is not compensable, a fortiorari, time spent traveling to the location where one signs in is not compensable travel time. The undersigned can discern no meaningful distinction between walking to the job site after clocking in, and riding to the job site after passing through the FAA mandated security checkpoint. Therefore, the Portal Act excludes from the FLSA the time which Plaintiffs spent traveling to and from the job site on the Turner-Austin buses. Accord Vega v. Gasper, 35 F.3d 417,425 (5th Cir.1994) (time spent each day traveling to and from work sites was not compensable where the workers performed no work prior to or while riding on the employer's buses, where they did not load tools or engage in activities that prepared them or their equipment for picking chile peppers before or while riding the buses, and where they were not required to ride the buses to get to the work site); Ralph v. Tidewater Construction Corp., 361 F.2d 806, 808 (4th Cir.1966) (riding 15 minutes to an hour by boat from the shore to work is a preliminary noncompensable activity); Smith v. Aztec Well Servicing Co., 321 F.Supp.2d 1234,1237 (D.N.M. 2004) (even if rig hands for oil and gas wells were required to travel with their drillers to and from well sites, travel time in and of itself was not "work" for which they had to be compensated, as the main reason rig hands traveled with drillers was for their own convenience, to save wear and tear on their vehicles, and to save the expense of traveling to and from work sites); Dolan v. Project Construction Corp., 558 F.Supp. 1308,1309-11

(D. Colo. 1983) (30 minute ride from main camp to job site on employer's buses was not compensable even though employees were required to use the buses due to security and safety concerns, and intermittent receipt of work information during the bus ride did not make the ride compensable time).

Plaintiffs contend that their travel to and from the parking lot to and from the job site is compensable because that travel was actually an indispensable part of their principal activities as Defendant's employees. Travel that is an indispensable part of performing one's job is a principal activity and is compensable. See Vega, 36 F.3d at 424. The indispensable travel principle is typically applied where the travel is coupled with performing tasks or transporting equipment without which the employee's job could not be done. See Preston v. Settle Down Enters., Inc., 90 F.Supp.2d 1267, 1280 (N.D. Ga. 2000), citing Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1349 (10th Cir. 1986) (workers carried special equipment for servicing oil rigs); D A & S Oil Well Servicing, Inc. v. Mitchell, 262 F.2d 552, 555 (10th Cir. 1958) (workers' time spent driving trucks hauling special equipment for servicing oil rigs is compensable); Wirtz v. Sherman Enterprises, Inc., 229 F.Supp. 746,752-53 (D. Md. 1964) (pinsetting equipment installation crews had no principal place of activity but traveled from one job site, finished a job, and immediately departed to the next job site were entitled to compensation for travel time between job sites, as the travel was an indispensable part of the principal activity). The indispensable travel principle has also been applied where travel is necessary to complete tasks once the workday has begun. See 29 C.F.R. §785.38 ("Time spent by an employee in travel

as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report to a meeting place to receive instructions or to perform other work there, or to pick up and carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice."). See also Preston, 90 F.Supp.2d at 1280 (travel time from the company's office to the job site was not compensable where the plaintiffs were not required to report to the office to receive instructions, but rather arrived at the office on their own in hopes of securing work on a day-to-day basis).

In Preston, the District Court denied summary judgment between factual issues remained surrounding the issue of whether the workers were free to proceed to the job site on their own or if they were required to report to the dispatcher to learn of their destination. 90 F.Supp.2d at 1281. Here, by contrast, the undisputed facts are that Plaintiffs that their destination was the Project job site at MIA's North Terminal and that Plaintiffs knew that their work would not being until they arrived there.

Plaintiffs' transportation is analogous to the examples of non-compensable travel given at 29 C.F.R. §790.7(f), which states:

Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered preliminary or postliminary activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other

actual place of performance of his principal activity or activities; ... and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.

This Department of Labor regulation is reasonable, and is therefore entitled to Chevron deference. See Falken v. Glynn County, 197 F.3d 1341, 1346 (11th Cir.1999) (the DOL's regulations implementing the FLSA are accorded deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

Title 29 C.F.R. §790.7(h) also states that "an activity which is a `preliminary' or `postliminary' activity under one set of circumstances may be a principal activity under other conditions". "Before it can be determined whether an activity is `preliminary or postliminary to (the) principal activity or activities' which the employee is employed to perform, it is generally necessary to determine what are such `principal activities'". See 29 C.F.R. §790.8(a). While a principal activity "need not be predominant in someway over all other activities engaged in by the employee in performing his job, they do not include noncompensable ` walking, riding or traveling' of the type referred to in section 4 of the Act." Id.

Here, the undisputed facts show that Plaintiffs' travel time was not part of the principal activities which they were employed to perform. Plaintiffs were laborers, carpenters and or safety employees at the Project job site. The travel at issue was not coupled with any work, and occurred before any work was done, and after all work was completed. Plaintiffs never received any

instructions or work assignments before being dropped off at the job site. Plaintiffs' transportation to the job site took place before the work day officially began, and after the work day officially ended. See Smith, 321 F.Supp.2d at 1237-38.

The cases relied on by Plaintiffs are not persuasive. Dunlop is factually distinguishable. It did not deal with travel time, but considered the plaintiffs' tasks in preparing to work such as "filling out daily time sheets, material sheets, and supply and case requisition sheets, removing from trucks trash accumulated during the previous day's work, loading the trucks with standard materials and any additional materials needed.... fueling the trucks, and picking up electrical plans for the day's job. These duties were to be completed before 8:00 a.m. to enable the men to depart from the shop by the beginning of their paid work day." See Dunlop, 527 F.2d at 397. The former Fifth Circuit analyzed the above activities and found that they were "principal" activities, and, thus, compensable. ld. at 400-01. The situation in the instant case is factually distinguishable from Dunlop because Plaintiffs' ride on the buses to and from the job site was not "performed as part of the regular work of the employees", and while it may have been necessary in some way to Defendant's business, it was not work actually "performed by the employees." See Dunlop, 527 F.2d at 400-01.

For the same reasons, the case at bar is also factually distinguishable from Steiner v. Mitchell, 350 U.S. 247, 255-56 (1956) (holding that changing clothes and taking showers were necessary parts of the principal work activities of the employees of a battery plant since those acts limited the employees' toxic exposure);

Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 724 (5th Cir. 1961) (holding that servicing, cleaning, loading, and refueling trucks and driving them from a truck yard to a material plant were indispensable parts of the employee's main activities), and McCormack v. City of Miami Beach, U.S. Dist. LEXIS 20980 (1994) (Moore, DJ) (denying cross-motions for summary judgment because the issue of whether police officers' exercise to maintain the necessary physical criteria for their jobs was of principal benefit to the city was a question of fact for trial).

The undersigned also finds that Plaintiffs have misplaced their reliance on Arriaga v. Florida Pacific Farms LLC, 305 F.3d 1228,1240 (11th Cir. 2002). Arriaga did not involve the Portal Act or the payment of wages, but rather was concerned with whether transportation costs paid for a single bus ride by employees were primarily for the benefit of the employer. In Arriaga, the Eleventh Circuit did reject the District Court's reliance on Vega, stating that "[a]lthough Vega employs the same language as the DOL regulations interpreting the FLSA - `primarily for the benefit of the employer' - the language is being applied to statutes with difference concepts and different purposes." Id. at 1241. Thus, by its own language, Arriaga is not applicable to this case, which construes the Portal Act.

Similarly, in Preston, the District Court denied summary judgment as to the compensability of the plaintiffs' return trip, holding that travel from the job site back to the office would be compensable if it primarily benefitted the employer and the employee could not effectively use the time for his own purposes.

90 F.Supp.2d at 1281. In this case, it is undisputed that all compensable work activity effectively ended when Plaintiffs left the job site. Thus, Plaintiffs here were free to use their return travel time as they wished.

Reich v. New York City Transit Auth., 45 F.3d 646 (2d Cir.1995), cited by Plaintiffs, supports this Court's finding that the travel time in this case is not compensable. In Reich, the Second Circuit found, relying on the Portal Act, that Transit Authority canine unit police officers were not entitled to compensation for their commute, even though they had to take their canines to and from work in their private cars and could not use public transportation. Id. at 652. The Second Circuit found that the officers' commuting involved neither exertion nor loss of time and did not qualify as work. Id. at 651. Similarly, Plaintiffs merely rode the buses to and from the job site. This did not involve either exertion or loss of time, and does not qualify as work.

Plaintiffs' reliance on Morillion v. Royal Packing Co., 995 P.2d 139 (Cal. 2000) is also misplaced. This is a California case which examined whether travel time was compensable under a state wage order. The court concluded that the Portal Act differed substantially from the state scheme and should be given no deference, and noted that the applicable state laws did not contain the express exemption for travel time which was found in the Portal Act. Id. at 147-48. The court ultimately found that the travel time was compensable under state law as the state Wage Order provided California workers with greater protection than the FLSA. Id. at 151. As Morillion does not interpret the Portal Act, it is not persuasive.

Plaintiffs note that the Construction Related Requirements (CRR) contain express provisions requiring them to take the Turner-Austin buses from the parking lot to the security gate, and from the security gate to the Project's job site. Plaintiffs contend that because they had no other means of accessing the job site, their transportation time is compensable as an indispensable activity of their job. However, assuming that the transportation was mandatory does not mean that it was a principal activity, nor that it was compensable. It appears that the transportation was required by MIA and Turner-Austin for safety and security reasons, and was not necessarily for Defendant's benefit. Finally, none of the provisions of the CRR state that the transportation time is compensable. Accordingly, the transportation time does not fall within 29 U.S.C. §254(b).

The undersigned notes that the parties have provided as supplementary authority Orders from other judges of this Court which have considered very similar issues to those raised here, and which involved various subcontractors working at MIA.[10] These decisions reflect a split among the District Judges regarding whether summary judgment is appropriate with respect to travel time to the job site within MIA. The undersigned notes that all of these decisions were rendered prior to the decision of the Supreme Court in Alvarez, and that every case must be determined on the facts presented in the summary judgment papers and the adequacy of the record. Based upon the decision of the Supreme Court in Alvarez, and the record in this case, however, the undersigned finds persuasive and adopts the analysis presented in the opinion of Judge Jordan in Castillo v. Cuven Corp.

In conclusion, the plain language of the Portal Act, 29 U.S.C. §254 excludes from compensation Plaintiffs' travel time to and from their job site. The travel in this case was not part of Plaintiffs' principal activities because no work was performed until Plaintiffs arrived at the job site and no work was performed after Plaintiffs left the job site. Therefore, Plaintiffs' motion for partial summary judgment is denied, and Defendant is granted summary judgment with respect to the noncompensability of Plaintiffs' travel time under the FLSA.

C. Defendant Is Entitled To Summary Judgment on the Overtime Rate Issue

Defendant is entitled to summary judgment on the overtime rate issue as the alleged injuries have already been remedied and there is not reasonable likelihood of recurrence.

Defendant correctly contends that Plaintiffs' overtime rate claim is moot because the claimed injuries have been remedied either before or after the filing of the lawsuit. See Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1244 (11th Cir. 2043) (settlement of a plaintiffs claim moots an action); Mackenzie v. Kindred Hospitals East, L.L.C., 276 F.Supp.2d 1211, 1216 (M.D. Fla. 2003) (a Rule 68 offer of judgment is an acceptable method of resolving a cased brought pursuant to the FLSA). Moreover, there is no reasonable likelihood of recurrence because it is undisputed that none of Plaintiffs are still employed by Defendant. The record evidence supports Defendant's contention that it has tendered to Plaintiffs all sums

due to them because of Defendant's miscalculation of the formula used to calculate Plaintiffs' overtime payments, and it also has served Offers of Judgment in excess of the maximum amount recoverable under those claims.

The record indicates, and Plaintiffs do not controvert that: 1) Defendant has paid Plaintiff Machado the shortfall due to the overtime rate miscalculation; 2) Defendant has also sent to Plaintiffs' counsel the checks for the shortfall due to the overtime rate miscalculation for the remaining Plaintiffs in the case; and 3) during the pendency of this case, Defendant served Offers of Judgment offering principal sums in excess of twice each Plaintiffs' overtime shortfall, together with interest and any attorney's fees and costs in order to compensate them for any conceivable loss that they may have incurred.

Plaintiffs provide three objections to the entry of summary judgment for Defendant on this issue. Plaintiffs initially contend that should this Court determine that the claimed transport time is compensable under the FLSA, the amount of overtime owed to Plaintiffs would have to be adjusted, and that Defendant has not mentioned whether the payments offered were only for hours actually worked or included the requested travel time. Plaintiffs next assert that the value of the restitution to them from Defendant is too speculative absent this Court's determination of whether travel time is compensable. Finally, Plaintiffs contend that Defendant has set forth no specific proof as to the amounts it purportedly paid each Plaintiff for the deficient overtime payments and has also not set forth how it calculated those amounts.

The undersigned finds that Plaintiffs' objections are meritless. Initially, as the undersigned has granted summary judgment to Defendant on the travel time issue, the amount of overtime owed to Plaintiffs does not have to be adjusted, and the value of the restitution to Plaintiffs from Defendant is fixed. Moreover, Plaintiffs have misread the evidence submitted by Defendant. Defendant has provided an affidavit which sets forth the amounts of the payments made in resolution of the overtime rate claim and the method by which the amount was calculated; and which clearly states that the offered payments were for hours worked and that travel time was not included (Affidavit of Jeffery Arnold, Ex. B to DE # 56, at 4-7). Plaintiff has not controverted these calculations.

Therefore, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (DE # 56), is GRANTED, Defendant's Motion To Dismiss (DE # 55), is DEEMED MOOT and that Plaintiffs' Motion for Partial Summary Judgment As To Liability (DE # 86), is DENIED. DONE AND ORDERED at Miami Florida this 28th, day of March 2006.

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Footnotes

[1] In addition, Carlos Cruz, Michael Machado, Carlos Alfonso Dinarte, Mario Orellana, Hector Diaz, Anibal Campusano, Roldan Torres, Sergio Sanchez, Omar Aguilar and Julio J. Alvarez have all been permitted to

opt-in and have been joined as party plaintiffs (DE ## 23, 24, 48, 90, 96). For purposes of this Order, there is no material distinction between any of the Baker employees in this case with respect to their job duties and the compensability under the FLSA of their travel time on buses.

[2]This Order grants Defendant's motion for summary judgment, which includes summary judgment on Plaintiffs' claims regarding the overtime rate issue. Therefore, the undersigned will neither summarize nor discuss Defendant's motion to dismiss Plaintiffs' claims regarding the overtime rate issue (DE # 55).

[3]While Defendant asked that Plaintiffs' motion for partial summary judgment be denied as untimely (DE # 92 at 1-2), this Court granted Plaintiffs' motion to file their motion for partial summary judgment out of time (DE # 90).

[4]The undersigned rejects Defendant's argument that Plaintiffs may not submit in support of their motion for partial summary judgment five depositions taken in a similar case. Sworn deposition testimony may be used in connection with a summary judgment motion regardless of whether the testimony was taken in a separate proceeding as long as the proffered depositions were made on personal knowledge and set forth facts that would be admissible in evidence at trial. See Stinnett v. Iron Works Gym/Executive Health Spa, 301 F.3d 610, 613 (7th Cir. 2002); Gulf USA Corp. v. Federal Ins. Co., 259 F.3d 1049,1056 (9th Cir. 2001); cf. Bozeman v. Grum, 422 F.3d 1265,1268 fn. 1 (11th Cir. 2003) (sworn statements given before court reporters are at least as reliable as signed affidavits and are

properly considered on summary judgment); In re Beiswenger Enterprises Corp. v. Carietta, 46 F.Supp.2d 1297,1299 (M.D. Fla. 1999) (in ruling on summary judgment motion, district court relied on deposition testimony taken in a state court action involving the same parties and subject matter).

[5]Plaintiff Cabrera does not controvert Defendant's assertions.

[6]For purposes of this Order, there is no material distinction between the use of Turner-Austin buses and Defendant's vans. Therefore, a reference to either is deemed to include both.

[7]The undersigned rejects Plaintiffs' argument that Defendant has admitted that the bus ride was an indispensable part of Plaintiffs' jobs (DE # 86 at 9). In support of their argument, Plaintiffs rely on the deposition testimony of Defendant's former employee Alan Niffin that it was indispensable for Defendant's employees to ride an authorized vehicle to get to the job site (Deposition of Alan Niffin, DE # 83 at 7). Initially, the questions of whether the bus ride was an indispensable part of Plaintiffs' jobs is a legal conclusion, and the record does not indicate that Niffin is qualified to opine. Secondly, it is undisputed that Niffin did not work for Defendant at the time of the deposition, so that his testimony did not bind Defendant (Deposition of Alan Niffin, DE # 83 at 3). Next, Niffin's answer was a response to a series of highly leading questions and there is no value to Niffin's answer. See Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 725 (5th Cir.1961 ).

[8]This decision of the former Fifth Circuit is binding on this Court. See Bonner v. City of Prichard, Ala., 661 F.2d 1206,1207 (11th Cir.1981) (en banc).

[9]The Court also found that the time spent by meat processing plant employees walking between locker rooms and production area after donning special safety gear in the locker room was not excluded from the FLSA by the Portal Act because the workday began when the employees donned the protective clothing. Id. at 524.

[10]See Soto v. Prestress Concrete, Inc., 02-23285-CIV-LENARD (DE # 111, filed 9129104, denying Plaintiffs' motion for partial summary judgment and Defendant's counter-motion for summary judgment) (DE # 91); Martinez v. Cuesta Construction Corp. alkla Dalecom Construction, 02-23321-CIV-HUCK/TURNOFF (DE # fig, filed 10118104, denying Plaintiffs' motion for partial summary judgment and Defendant's counter-motion for summary judgment) (DE # 98); Lopez v. Prestress Concrete, Inc., 04-20021-CIV-SEITZ (DE # 62, filed 1119105, denying Plaintiffs' motion for partial summary judgment and Defendant's motion for summary judgment) (DE # 99); Medina v. 3C Construction Corp., 02-23090-CIV-LENARD (DE # 788, filed 11121105, denying Plaintiffs' motions for partial summary judgment, and granting in part and denying in part Defendants' motions for summary judgment) (DE # 104) and Castillo v. Cuven Corp., 04-20013-CIV-JORDAN, (DE # 98, filed 9121105, denying Plaintiffs' motion for partial summary judgment, and granting Defendant's motion for summary judgment) (vacated for lack of jurisdiction, due to defendant's Suggestion of Bankruptcy, by DE # 101, filed 1215105) (DE # 104).

Filed: 7/27/07

No. 06-12515

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PERCY BONILLA, MIGUEL HERNANDEZ, CARLOS CRUZ, MICHAEL MACHADO, JULIO J. ALVAREZ, GERMAN SANDOVAL, CARLOS CASTRO, EDGARDO AVILA, JOSE A. CABRERA, PORFIRIO VARELA, ERMIN TALAVERA,

Plaintiffs-Appellants,

versus

BAKER CONCRETE CONSTRUCTION, INC.,

Defendant-Appellee.

ON PETITION(S) FOR REHEARING AND PETITION(S.) FOR REHEARTNG EN BANC

Before: Black, Barkett and Kravitch, Circuit Judges

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED,

ENTERED FOR THE COURT:

/s/Phyllis Kravitch

UNITED STATES CIRCUIT JUDGE